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Supreme Court, U.S.
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No. 97-578

In The

Supreme Court of the United States

October Term, 1996

JENICE TORRES,

Petitioner,

vs.

LEONARD PISANO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court below correctly affirm the grant of summary judgment to New York University in this hostile environment sexual and national origin harassment case where the petitioner employee several times requested that the matter of which she complained be kept confidential, and where she declined to invoke various University procedures, of which she had knowledge, for making a complaint and when she eventually requested action, the University's response was prompt and effective?

PARTIES TO THE PROCEEDING

The petitioner is Jenice Torres.

The respondents are New York University, Leonard Pisano and Stephen Heller.

The respondent New York University is a not for profit New York education corporation. It has no parent or subsidiary corporations.

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STATEMENT OF THE CASE

The petitioner seeks this Court's review of the Second Circuit's opinion affirming the grant of summary judgment by the District Court for the Southern District of New York to the respondent New York University[1] ("the University") on claims by the petitioner under Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. § 2000e *et seq.*) ("Title VII"), Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*) ("Title IX") and various state law claims. The Second Circuit's opinion is reported at 116 F.3d 625 (2d Cir. 1997). The District Court's opinion is reported at 71 FEP Cases 837 (BNA) and 1996 U.S. Dist. LEXIS 9800.

There is no cause for this Court's review of this fact-specific case where the courts below have correctly applied existing law. Moreover, the petitioner appears indirectly to seek review of a question of law, *i.e.*, the existence of an implied private right of action for employment discrimination under Title IX, a question which neither of the courts below found necessary to reach (App. 9, n. 3).

The petitioner, Jenice Torres, is a current employee of the University. Petitioner was employed from 1990 to 1994 as secretary to Eugene Coe, the building manager of the University's College of Dentistry (App. 3).

According to the petitioner, Coe would come back from lunch under the influence of alcohol and use profanity in the office, including ethnically and sexually derogatory remarks

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1. The District Court had earlier dismissed the claims against the individuals Leonard Pisano and Stephen Heller. *Torres v. New York University*, 1996 U.S. Dist. LEXIS 356. The petitioner withdrew her appeal from that order before the Second Circuit (App. 8, n. 2).

(App. 4). From 1990 to 1993, the petitioner did not speak to Coe or any supervisor about Coe's behavior.

The petitioner maintained that she did not complain about Coe to any University manager until September 1993, when she was called by Leonard Pisano, the assistant director of maintenance of academic facilities. Pisano was not then Coe's supervisor (App. 4-5). Pisano, concerned about petitioner because of discussions with another employee regarding Coe's conduct, called the meeting to discuss the situation. Pisano, at the meeting, requested that petitioner submit a written complaint. Having received no response from petitioner, sometime in December 1993 or January 1994, Pisano again asked the petitioner for a written complaint. On or about February 23, 1994, five months after originally having been asked to submit a complaint, petitioner submitted a handwritten letter to Pisano regarding Coe (App. 4-5).

In her letter, petitioner made general complaints regarding Coe. Her allegations were in regard to Coe's unfairness to other employees, her unsuccessful request for a salary increase, and she alleged that Coe had said otherwise undescribed "degrading" things to her. Petitioner did not recount many specific allegations of harassment. In closing, petitioner thanked Pisano for his "confidentiality and your time". She did not request that Pisano do anything at that time except keep the matter confidential (App. 5).

Upon Pisano's request for more detail, petitioner submitted a second letter several days later, recounting a number of episodes of verbal harassment (App. 5-6).

In early March 1994, Pisano, who had recently become Coe's supervisor, spoke to the petitioner about her second letter. Pisano was told by the petitioner "not to speak to anyone" and

the petitioner told Pisano to keep it confidential. Petitioner did not broach the subject with Pisano again until late June 1994, at a meeting with Pisano and his supervisor, Stephen Heller, the University's Assistant Vice President for Administrative Services. At the meeting, Heller referred petitioner to a counselor at the University (App. 6).

In July 1994, while Coe was on vacation, Heller and Pisano met with petitioner and informed her that she would be transferred as a secretary from Coe's office to Pisano's office before Coe returned from vacation. Shortly thereafter, she filed a charge with the Equal Employment Opportunity Commission ("EEOC"). She never again worked with Coe.

In August 1994, Heller and Pisano, on separate occasions, spoke briefly with petitioner after her transfer to inquire if she would drop the charge filed with the EEOC. They never spoke again about the subject. On August 15, 1994, the petitioner wrote a letter to Heller stating that "your request has been denied". The petitioner did not withdraw the charge and admitted that nothing adverse occurred as a result (App. 34-36). In October 1994, the petitioner was again transferred, per her request, with good recommendations from Pisano, to a position as a departmental secretary at the University's Medical Center. Her salary was increased approximately $6,500 per annum (App. 6).

Petitioner was aware that she was covered by her union's collective bargaining agreement which prohibited employment discrimination and set out a grievance procedure. Also, she was aware of the University's written policy and procedure concerning sexual harassment. The petitioner admitted that she did not file a grievance under the union contract, or with those individuals listed in the University's sexual harassment policy (App. 25).

In August 1994, Heller met with Coe to inform him of petitioner's allegations. Heller told Coe that the matter would be investigated and if there was any veracity to the petitioner's allegations, Coe would face serious disciplinary action. On September 1, 1994, Heller informed Coe that his employment was terminated.[2] (App. 6). The University took prompt and effective action in response to petitioner's complaint (App. 6, 35-6).

REASONS FOR DENYING THE WRIT

1. The Second Circuit's opinion does not in any way conflict with this Court's decisions in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Rather, the court below correctly stated the law as set forth in *Meritor* and *Harris* (App. 10) and applied it in this very fact-specific case, a case where an employee, who had not raised a complaint on her own initiative, is repeatedly asked for a complaint about harassment and where the employee repeatedly asks that no action be taken and that the matter be kept confidential.[3] The Second Circuit noted that, in this

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2. Coe commenced litigation against the University arising out of his discharge from employment. *See Coe v. New York University*, 10 IER Cases 1246 (BNA) (Sup. Ct. N.Y. Co. 1995).

3. The petitioner mischaracterizes this Court's decision in *Meritor* by stating that this Court "rejected the view that the mere existence of a grievance procedure and policy against discrimination, coupled with the victim's failure to invoke that procedure, must insulate the employer from liability" (petition, p. 9). In *Meritor*, this Court noted that this circumstance was "plainly relevant" but that the grievance procedure at issue did not address sexual harassment and appeared to require the plaintiff-employee to present her grievance to the alleged harasser. 477 U.S. at 72. Here, the University's grievance procedures specifically addressed sexual harassment and provided the names of a number of

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situation, "the resolution will vary from case to case" (App. 31-33). When the petitioner did seek action, "the harassment was promptly terminated" by the University (App. 32). Under the court below's analysis of the facts of this case, the court found this not to be among the cases, as this Court noted in *Meritor*, where "employers are always automatically liable for sexual harassment by their supervisors". *Meritor*, 477 U.S. at 72. In the Second Circuit, the petitioner argued, contrary to *Meritor*, that employer liability was automatic (appellant's brief to Second Circuit, pp. 10-11). The petition, given its most liberal reading, appears to argue that there were erroneous factual findings or that the correct rule of law was misapplied. Rule 10 of this Court provides that certiorari is "rarely granted" on such a petition and the petition contains no matter justifying any conclusion that such a rarity should be found to exist by the Court in this case.

2. Petitioner argues that the Second Circuit's opinion is in conflict with the First Circuit's opinion in *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988). *Lipsett* was not cited by the petitioner in her brief to the Second Circuit. There is no conflict. Both *Lipsett* and *Torres* correctly recite the rule of law regarding notice to an employer of the existence of sexual harassment. *Lipsett*, 864 F.2d at 901 and *Torres* at App. 19-20. On the specific facts of *this* case, the Second Circuit, applying the rule, correctly found the employer's response reasonable (App. 31-34).

The petitioner, who argues this point under Title IX, apparently assumes, without argument, that Title IX creates an implied private right of action for employment discrimination

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individuals to whom complaints could be made (App. 25). This is the "substantially stronger" case for the employer to which this Court referred in *Meritor*, 477 U.S. at 73.

against an educational institution. In *Lipsett*, the petitioner, a medical resident, "was both an employee *and* a student" 864 F.2d at 897 (emphasis in original). The issue of the applicability of Title IX apparently was not raised. As pointed out by the respondents and as noted by the Court below, it is not established that Title IX creates such a private right of action (App. 9-10, n. 3). The only circuit squarely to have addressed the issue has held that there is no private right of action for sex discrimination in employment by an employee of an educational institution under Title IX. *Lakoski v. James*, 66 F.3d 751, 754 (5th Cir. 1995), *cert. denied sub nom*, *Lakoski v. University of Texas*, __ U.S. __, 117 S. Ct. 357 (1996); *Lowrey v. Texas A & M University System*, 117 F.3d 242 (5th Cir. 1997).[4] The petitioner, in effect, seeks a writ of certiorari on a question not directly addressed in the petition or by the courts below and on which only one circuit has ruled in a case recently denied certiorari by this Court.

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4. Petitioner may have taken this approach because the respondents raised the issue in the court below (which question was not reached) that the petitioner did not commence this action under Title VII within 90 days of her receipt of a "right to sue" notice from the Equal Employment Commission, as required. 42 U.S.C. § 2000e-5(f)(1).

CONCLUSION

As the court below applied established law and no conflict among the circuits is presented, the petition should be denied.

Respectfully submitted,

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